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IN THE
# Supreme Court of the United States
OCTOBER TERM, 1982

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COPPERWELD CORPORATION, *et al.*,
*Petitioners,*

v.

INDEPENDENCE TUBE CORPORATION,
*Respondent.*

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**On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit**

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## BRIEF OF THE CANADIAN MANUFACTURERS ASSOCIATION AND THE CANADIAN CHAMBER OF COMMERCE AS AMICI CURIAE SUPPORTING PETITIONERS

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## QUESTION PRESENTED

Whether a parent corporation and its wholly-owned subsidiary are capable of conspiring together in violation of the Sherman Act?

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The Canadian Manufacturers Association and The Canadian Chamber of Commerce submit this brief as *amici curiae* in support of the petitioners.

### INTEREST OF AMICI CURIAE

The Canadian Manufacturers Association ("CMA") is the oldest and largest trade association of manufacturers in Canada. Its more than 3,500 members comprise companies situated across Canada in all sectors of industry, and together produce about seventy-five percent of all goods made in Canada. The CMA provides informational services to its members to improve their competitiveness and acts as a spokesman for manufacturers to all levels of government in Canada.

The Canadian Chamber of Commerce is the largest organization of businesses in Canada and includes among its membership companies of all sizes located throughout the country. Its approximately 145,000 members are believed to constitute nearly half of all incorporated businesses in Canada.

Many of the members of the Canadian Manufacturers Association and the Canadian Chamber of Commerce are affiliated by ownership with corporations located in the United States.

The Court is asked to determine in this case the circumstances, if any, in which corporations affiliated by a common ownership can be considered capable of engaging in a Sherman Act conspiracy under the "intraenterprise conspiracy" doctrine. Although *amici* and their members have no direct interest in the outcome of this case involving a U.S. corporation and its wholly-owned domestic subsidiary, the Court's decision here could affect substantially the business relationships between Canadian corporations and their affiliates in the United States, as well as the trade relations between the governments of Canada and the United States. Canadian-United States trade is of tremendous importance to both countries: two-way trade between Canada and the United States exceeded $85 billion (U.S.) in 1982,[1] and each country is the other's largest export market.[2] For these reasons,

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[1] Government of Canada, Statistics Canada Daily, July 12, 1983, at 3.

[2] In 1981, approximately seventy percent of all Canadian exports were to the United States, while twenty percent of all U.S. exports were to Canada. United States exports to Canada were more than twice as large as U.S. exports to Japan, the next largest U.S. export market, and were nearly as large as U.S. exports to the entire European Economic Community. Address by the Hon. Allan E. Gottlieb, Canadian Ambassador to the United States, at the American Association of Exporters and Importers' Seminar on Exporting to Canada (Jan. 28, 1982).

the Court's judgment in this case should be informed by the special considerations applicable to the relationships between affiliated companies based in the two countries, particularly in terms of the policies of the Canadian government with respect to foreign investment in Canada.[a]

## SUMMARY OF THE CASE

Petitioners, a U.S. corporation and its wholly-owned domestic subsidiary, seek reversal of an antitrust judgment that was entered against them solely on the basis that their joint activities constituted a conspiracy in violation of the Sherman Act. They urge the Court to adopt a rule that a parent company and its wholly-owned subsidiary are not separate entities legally capable of engaging in concerted action with each other within the meaning of that statute.

The United States supports petitioners' argument that the intraenterprise doctrine advances no economic or antitrust-related interest and improperly blurs the Sherman Act's different standards for unilateral and multiparty conduct. The United States argues that the relevant inquiry in determining whether affiliated companies are capable or incapable of conspiring with each other is one of control, and that where one related company controls the other, or where they are commonly controlled, they should be considered a single entity incapable of conspiring in violation of the antitrust laws. The United States suggests that control should be presumed where there is majority stock ownership.

Respondent, for its part, concedes that separate incorporation alone is insufficient to support a conclusion

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[a] Our interest and the focus of discussion in this brief relate to Canadian policies concerning foreign investment. As noted below, however, many other countries also impose various similar obligations. To that extent, our discussion applies as well to the relationships between United States firms and affiliated firms in countries other than Canada.

that affiliated companies are legally capable of conspiring with each other. It argues instead that such a conclusion should be permitted in some circumstances under a rule dependent, in the first instance, on a determination that the affiliated corporations are to some undefined degree sufficiently "independent" in their methods of operation that the fact of their affiliation should be ignored.

The court of appeals in this case applied such a rule and approved the district court's jury instruction that petitioners should be found to have the legal capacity to conspire if they "operated as separate entities." (Pet. App. A 40.) The instruction mentioned nine factors as relevant to this question and also permitted the jury to consider "any other facts you [the jury] find that are relevant . . . ."[4] (Pet. App. A 41.) Other courts have mentioned different factors or groups of factors as relevant to determining the "separateness" of affiliated corporations.[5] No court, however, has provided any framework within which the relative significance of these factors should be determined or any analysis of their significance to economic or antitrust concerns.

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[4] The specified factors included "[w]hether the two companies are run by separate management staffs"; "[w]hether the two companies maintained separate corporate officers"; "[t]he degree to which the subsidiary sets its own policies regarding sales, engineering, production, purchasing, negotiation of the labor agreements, and other aspects of its business" in terms of both "day-to-day operating decisions and the major or executive policy decisions"; "[w]hether the two companies maintained separate bank accounts, separate records, and separate facilities, including such things as pension plans"; and "[w]hether both companies have common officers or directors," although "[t]he existence of some common officers or directors does not alone render the two companies incapable of conspiracy." (Pet. App. A 40-41.)

[5] *See, e.g., Ogilvie v. Fotomat Corp.*, 641 F.2d 581, 589 (8th Cir. 1981); *Photovest Corp. v. Fotomat Corp.*, 606 F.2d 704, 726-27 (7th Cir. 1979), *cert. denied*, 445 U.S. 917 (1980); *Knutson v. Daily Review, Inc.*, 548 F.2d 795, 802 (9th Cir. 1976), *cert. denied*, 433 U.S. 910 (1977).

## SUMMARY OF ARGUMENT

In deciding this case, the Court should consider the consequences of any rule it might fashion on the very substantial trade between Canada and the United States. Canadian law, like the law of many countries, significantly and legitimately influences the nature, extent, and business structure of local investment by foreign interests. One of the purposes of the Canadian law is to encourage and require Canadian interests to participate in various aspects of the control of Canadian assets and businesses. Under the rule of law applied by the lower courts in this case, promoting such participation, and various indicia thereof, could place Canadian firms and their U.S. affiliates in the position of being deemed capable of conspiring in violation of U.S. antitrust law by the mere fact that such firms complied with Canadian law or policy within Canada. Such unthinking application of U.S. antitrust law to the relations between U.S. firms and their Canadian affiliates could threaten the viability of those relations, the trade they promote, and, more broadly, relations between the United States and Canada.

Especially in the case of foreign subsidiaries, the Court should hold that business enterprises under common control are incapable as a matter of law of conspiring in violation of the Sherman Act. As the U.S. Department of Justice has suggested, "control" for purposes of this determination should be conclusively presumed where the voting stock ownership exceeds fifty percent, irrespective of various indicia of separateness or independence that might otherwise exist.

Any rule of general applicability adopted by the Court should also take into account that there are many instances in which, pursuant to Canadian law and policy, a U.S. firm may share control with a Canadian affiliate over their common Canadian interests, with neither being

wholly-owned (or even majority-owned) by the other. These affiliates may also have several indicia of separateness or independence. In such circumstances, lower courts nonetheless should be permitted to consider, *inter alia*, the extent to which the "parent" firm may exercise effective control over various competitive aspects of the business of the common enterprise, in particular those aspects of the business affecting U.S. commerce. The fact that the U.S. firm and its Canadian affiliate may share control over the Canadian aspects of their business, in accordance with Canadian law and policy, should not be a sufficient basis for concluding that they have the capacity to conspire in violation of U.S. antitrust law.

It is in the clear interest of U.S. firms, and of the U.S. economy generally, that such firms be permitted to do business abroad as well as within the United States. Operating in foreign countries, often through foreign subsidiaries or affiliates, these firms must comply with the laws of the countries in which they do business. They should not be penalized under U.S. antitrust law for such compliance. Both the amount of trade and policy considerations involved are probably greatest in the case of Canada, the United States' close neighbor and largest trading partner.

## ARGUMENT

### I. CORPORATIONS UNDER COMMON CONTROL SHOULD BE CONSIDERED INCAPABLE OF CONSPIRING WITH EACH OTHER IN VIOLATION OF THE SHERMAN ACT

The intraenterprise conspiracy doctrine generally is recognized to have originated in this Court's decision in *United States v. Yellow Cab Co.*, 332 U.S. 218 (1947). In the thirty-five years since *Yellow Cab*, it has been the subject of extensive litigation and scores of reported opinions. No court, however, has articulated a logical or economic reason for a rule that two companies under common control should be considered capable of conspiring with each other within the meaning of the Sherman Act. In fact, courts have acknowledged that affiliated companies choose to be separately incorporated for entirely legitimate reasons unrelated to any competition or antitrust concerns.[6] Moreover, it is established law under the Sherman Act that unincorporated divisions of the same company are legally incapable of conspiring with each other, even though the management and operation of each division may be indistinguishable from that of a separately incorporated subsidiary.[7] In effect, overriding importance has been attached to the formality of separate incorporation, contrary to this Court's admonition in *Yellow Cab* that "substance rather than form" must be the controlling consideration. (332 U.S. at 227.)

Although the court of appeals correctly recognized that the mere fact of separate incorporation should not be

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[6] *See, e.g., Ogilvie v. Fotomat Corp.*, 641 F.2d 581, 589-90 (8th Cir. 1981); *I. Haas Trucking Corp. v. New York Fruit Auction Corp.*, 364 F. Supp. 868, 873 (S.D.N.Y. 1973).

[7] *See, e.g., H&B Equipment Co. v. International Harvester Co.*, 577 F.2d 239, 244 (5th Cir. 1978); *Jos. E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors Ltd.*, 416 F.2d 71, 82-84 (9th Cir. 1969), *cert. denied*, 396 U.S. 1062 (1970).

given any significant weight, its alternative "standard" is equally inappropriate as a means of ensuring that substance, not form, dictates the result. As petitioners and the *amici* supporting them on the petition for *certiorari* have demonstrated, the "separateness" or independence of operation of commonly controlled corporations is no more indicative of any need or justification for antitrust scrutiny of the relationships between them than is the fact of their separate incorporation. While we agree with petitioners that the court of appeals' analysis is inappropriate under any circumstances, its artificiality becomes particularly clear as applied to affiliated companies doing business in different countries.

Without question, there are legitimate reasons for a company seeking to do business in another country to do so through a separately incorporated subsidiary.[8] But, business, tax, and other economic considerations that make separate incorporation convenient or advantageous when both companies do business in the same country frequently are of overriding importance when operations in different countries are involved. Such companies necessarily operate in very different business and legal environments and, business considerations aside, the need to comply with disparate regulatory systems as a practical matter may dictate separate incorporation.[9] Similarly, relatively independent management of such companies in recognition of the differing circumstances fac-

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[8] As the Department of Justice recently acknowledged, there are "perfectly legitimate reasons why a domestic [U.S.] corporation might wish to operate overseas through separately incorporated subsidiaries rather than through divisions. The use of subsidiaries may offer personnel, management, political and financial or tax advantages." Memorandum of the United States in Response to Motion of the Timken Company to Terminate the Final Judgment, at 7-8 (May 20, 1983), *United States v. Timken Roller Bearing Co.*, No. 24214 (N.D. Ohio).

[9] McQuade, *Conspiracy, Multicorporate Enterprises, and Section 1 of the Sherman Act*, 41 Va. L. Rev. 183, 186 (1955).

ing them hardly can be considered surprising or a matter of antitrust concern.[10]

Moreover, in Canada, as in many other countries,[11] government policy concerning foreign investment directly and substantially affects the structure and management of affiliated corporations. The most significant of the various statutory and regulatory requirements implementing this policy in Canada is the Foreign Investment Review Act ("FIRA" or "the Act"),[12] which in general requires notification and government approval of both the establishment of new businesses and the acquisition of existing businesses in Canada by non-Canadians.[13]

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[10] *See generally* R. Berenbeim, Operating Foreign Subsidiaries: How Independent Can They Be? (The Conference Board, Report No. 836, 1983).

[11] *See, e.g.*, Price Waterhouse & Co., Investment Policies in Seventy-three Countries: Second Annual Survey (1982) (58 of 73 countries surveyed imposed some form of ownership restrictions). Mexico, for example, imposes numerous restrictions on U.S. and other non-Mexican interests doing business there. Certain commercial activities are reserved to the state, other activities are reserved to Mexican citizens and Mexican companies having charters excluding foreign participation, and other activities may permit foreign capital participation up to specified minority percentages. Foreign investment capital may not exceed forty-nine percent except as permitted in special circumstances by the National Commission on Foreign Investment. Law to Promote Mexican Investment and to Regulate Foreign Investment, D.O. Mar. 9, 1973, *reprinted in translation in* Multinational Corporation Law: Mexico, Central America, Panama and the Central American Common Market § B.2a, at 1 (M. Gordon ed. 1983).

The United States similarly imposes various restrictions and requirements on certain types of foreign investment in the United States. *See, e.g.*, American Bar Ass'n, A Guide to Foreign Investment Under United States Law (1979).

[12] Stat. Can. 1973-74, ch. 46, as amended by Stat. Can. 1976-77, ch. 52 and Stat. Can. 1980-81-82, ch. 107.

[13] This statement of the scope of FIRA's coverage is imprecise in a number of respects not material for present purposes. For a discussion of FIRA's coverage provisions, *see, e.g.*, Brown, *Foreign Investment Controls in Canada and Australia* in Inter-

Under FIRA, non-Canadians are permitted to establish new businesses in Canada or acquire existing Canadian businesses only when the government determines that such action "is or is likely to be of significant benefit to Canada."[14] In making this determination, the Foreign Investment Review Agency and ultimately the Canadian Cabinet[15] are required to consider five factors prescribed by the Act: (1) the effect of the proposed transaction on the level and nature of economic activity in Canada, including employment, resource processing, utilization of Canadian goods and services, and Canadian exports; (2) the "degree and significance of participation by Canadians" in the business in question and in the relevant industry in Canada; (3) the effect of the proposed transaction on productivity, industrial efficiency, technological development, product innovation, and product variety in Canada; (4) the compatibility of the proposed transaction with Canadian industrial and economic policies and the policies of the governments of those provinces likely to be significantly affected by it; and (5) the effect of the proposed transaction on competition in Canada.[16]

In practice, applicants seeking approval under FIRA frequently must enter into legally binding undertakings

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national Antitrust: Fifth Annual Fordham Corporate Law Institute 436, 452-63 (B. Hawk ed. 1979); Note, *Canada's Foreign Investment Review Act Revisited*, 4 Fordham Int'l L.J. 175, 181-87 (1981).

[14] FIRA § 2(1).

[15] For a discussion of the review process, *see, e.g.*, Tennier, *Some Practical Advice on Canada's Foreign Investment Review Process*, Foreign Investment Rev., Spring 1981, at 8; Beck, *Law and Policy in the Operation of Canada's Foreign Investment Review Agency*, 45 Sask. L. Rev. 183, 189-92 (1981).

[16] FIRA § 2(2). Under Canadian competition law, affiliated corporations are exempt from coverage under provisions relating to "conspiracy-type" offenses. *See* Combines Investigation Act, Can. Rev. Stat. ch. C-23 (1970), as amended by Stat. Can. 1974-75-76, ch. 76 and Stat. Can. 1977, ch. 28, §§ 31.4(4)-(6), 32(7), 32.2(3), 38(2), 38(7)-(7.1).

concerning the ownership, management and operations of the Canadian business to be established or acquired. Although only limited information concerning specific undertakings is publicly available,[17] they have included commitments concerning: the proportion of Canadians among the directors, officers and other management employees of the Canadian business[18] and the extent of the responsibility of Canadian management for its operations;[19] em-

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[17] The Review Agency interprets the Act to prohibit disclosure of such information absent the permission of the parties involved. *E.g.*, Foreign Investment Review Act Annual Report 1981-82, at 3 (1982) ("FIRA Annual Report 1981-82"). The Review Agency publishes information concerning undertakings entered into in selected specific transactions with the permission of the parties, *see, e.g., id.* at 3-4, and for each allowed transaction provides a rather general categorization of the respects in which it was found to be of likely significant benefit to Canada. *See, e.g., id.* at 31-71.

[18] *See, e.g.*, FIRA Annual Report 1981-82, at 3 (applicant undertook that at least two-thirds of the directors of acquired business would be Canadians); FIRA Annual Report 1980-81, at 4 (applicant undertook that at least two-thirds of the directors and a majority of the officers of newly established business would be Canadians); FIRA Annual Report 1978-79 (Supp.), at 12-13.

Apart from FIRA, Canadian-chartered corporations frequently are required to have a majority of Canadian directors. For example, the Canada Business Corporation Act ("CBCA"), Stat. Can. 1974-75-76, ch. 33, the Canadian federal statute under which most large Canadian corporations are chartered, requires that a majority of the directors be resident Canadians, CBCA § 100(3), and ordinarily permits the board of directors to act only when a majority of the directors present at a meeting of the board are resident Canadians. CBCA § 109(3)-(4). Committees of the board similarly are required to have a majority of Canadian members. CBCA § 110(2). Alternatively, the directors may appoint a managing director to exercise most powers of the board, but only if the managing director is a resident Canadian. CBCA § 110(1). The corporation laws of a number of Canadian provinces also contain provisions requiring that a majority of the directors be Canadian. *See* FIRA Annual Report 1978-79 (Supp.), at 12. FIRA undertakings concerning the composition of the directors usually have involved commitments beyond those imposed by the relevant chartering statute. *Id.*

[19] *See, e.g.*, FIRA Annual Report 1981-82, at 3 (applicant undertook to allow Canadian management freedom to manage the day-to-

ployment of other Canadian personnel;[20] further investments in the Canadian business;[21] export commitments,[22] including the assignment to the Canadian business of exclusive rights to export to certain countries or to market certain products worldwide;[23] the processing of raw materials in Canada;[24] the use of Canadian raw materials and supplies where available on terms competitive with imports;[25] and the funding and operation of research and development in Canada,[26] including in some instances commitments that "the Canadian subsidiary [will be given] exclusive corporate responsibility for research, development, manufacturing and worldwide marketing of specific products, groups of products, or product lines."[27] FIRA undertakings also have included commitments to permit Canadians to participate in the ownership of the Canadian business through public offerings

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day operations of the new business); FIRA Annual Report 1980-81, at 5 (applicants undertook that board of directors of bulk commodities handling terminal to be acquired would have autonomy to consider and deal in good faith with all offers by potential terminal users).

[20] *See, e.g.*, FIRA Annual Report 1981-82, at 3; FIRA Annual Report 1978-79 (Supp.), at 2-3.

[21] *See, e.g.*, FIRA Annual Report 1981-82, at 3-4; FIRA Annual Report 1980-81, at 5; FIRA Annual Report 1979-80, at 5; FIRA Annual Report 1978-79 (Supp.), at 5.

[22] *See, e.g.*, FIRA Annual Report 1981-82, at 4; FIRA Annual Report 1979-80, at 5, 6; FIRA Annual Report 1978-79 (Supp.), at 5-7.

[23] FIRA Annual Report 1978-79 (Supp.), at 6.

[24] *See, e.g.*, FIRA Annual Report 1978-79 (Supp.), at 7-8.

[25] *See, e.g.*, FIRA Annual Report 1980-81, at 5; FIRA Annual Report 1978-79 (Supp.), at 8-9.

[26] *See, e.g.*, FIRA Annual Report 1981-82, at 3; FIRA Annual Report 1978-79 (Supp.), at 13-14.

[27] FIRA Annual Report 1978-79 (Supp.), at 14.

or private placements of shares [28] or the participation of Canadian joint venture partners.[29] While FIRA undertakings typically relate to the operation of the particular Canadian business to be established or acquired, where the applicant has other Canadian businesses or is a Canadian subsidiary of a non-Canadian company, undertakings concerning those businesses have been necessary in some cases.[30]

In short, Canadian government policy as implemented through FIRA substantially affects the nature of the relationships between Canadian companies and their affiliates in the United States, and, in some cases, effectively requires that there be a degree of independence in their management. Under these circumstances, considerations of international comity alone must weigh heavily against any rule that subjects those relationships to scrutiny under U.S. antitrust law. Even apart from such considerations, however, there is no principled basis on which to subject those relationships to even the possibility of enhanced risk under U.S. antitrust law.[31] This Court previously has recognized the inappropriateness of indis-

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[28] *See, e.g.*, FIRA Annual Report 1980-81, at 4; FIRA Annual Report 1979-80, at 4, 6; FIRA Annual Report 1978-79 (Supp.), at 10-12.

[29] *See, e.g.*, FIRA Annual Report 1981-82, at 3; FIRA Annual Report 1978-79 (Supp.) at 12.

[30] *See, e.g.*, FIRA Annual Report 1978-79, at 12; FIRA Annual Report 1977-78, at 15.

[31] We do not address here any questions concerning the competitive effect of the creation of the inter-corporate relationship in the first instance. As the United States pointed out in its brief in support of the petition, remedies against acquisition posing significant threats to competition are available under statutes other than the Sherman Act. Moreover, a corporate affiliation created in furtherance of a pre-existing concert of action may violate the Sherman Act without regard to any rule of intraenterprise conspiracy. *See Timken Roller Bearing Co. v. United States*, 341 U.S. 593 (1951); *United States v. Yellow Cab Co.*, 332 U.S. 218 (1947).

criminate application of the intraenterprise doctrine to commercial practices dictated, as a practical matter, by government regulation. *See United States v. Citizens & Southern National Bank*, 422 U.S. 86, 111-20 (1975). Moreover, application of the court of appeals' analysis to such relationships, far from serving any interest relevant to U.S. antitrust enforcement, simply demonstrates the artificiality of the "separateness" standard it applied. Where corporations are under common control, the competitive significance of normal cooperation and interaction between them does not change simply because they have separate managers, headquarters or bank accounts. Yet, under the court of appeals' decision in this case, the economic reality of common control is simply ignored and such formal matters as these are given determinative effect.

Permitting scrutiny of relationships between affiliated companies under provisions of U.S. antitrust law designed to regulate concerted behavior between wholly independent economic entities disserves the interests of both the United States and Canada. While the Canadian government has determined in the exercise of its sovereignty that limiting conditions should be attached to non-Canadians' ability to do business in Canada, both Canada and the United States benefit by economic interaction between the two countries.[22] Legal rules, like the intraenterprise conspiracy doctrine, that enhance either the actual or perceived risk of trade between the two can

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[22] Recognizing the benefits of trade between the two countries, Canada and the United States in 1965 signed the Agreement Concerning Automotive Products between the Government of the United States and the Government of Canada, 17 U.S.T. 1372, T.I.A.S. No. 6093 (implemented by the Automotive Products Trade Act of 1965, 19 U.S.C. § 2001, *et seq.* (1976)), allowing the efficient rationalization and allocation of production facilities between Canadian and American affiliated companies. *See, e.g.*, H. Helmers, The United States-Canadian Automobile Agreement: A Study in Industry Adjustment (1967).

only act as a deterrent to investments and business ventures beneficial to both.

This deterrent effect is particularly acute because plaintiffs in private litigation involving the intraenterprise doctrine frequently have attempted to characterize normal interaction among affiliated corporations as "price fixing" or a "concerted refusal to deal" subject to rules of *per se* illegality.[33] Such claims have been rejected on various grounds in a number of cases,[34] and the Department of Justice has made clear its rejection of such arguments.[35] Nevertheless, the possibility, however remote, that normal inter-corporate dealings between affiliated corporations will be considered a *per se* violation of U.S. antitrust law—without possibility of explanation or justification—must deter businessmen from making the substantial investments required in furtherance of Canadian-United States trade.[36]

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[33] *See, e.g., Reisner v. General Motors Corp.*, 511 F. Supp. 1167 (S.D.N.Y. 1981), *aff'd*, 671 F.2d 91 (2d Cir.), *cert. denied*, 103 S. Ct. 130 (1982) (plaintiff claimed that refusal of General Motors and its German subsidiary to sell automobile engines to plaintiff was a group boycott unlawful *per se* under Section 1 of the Sherman Act).

[34] *Id.* at 1173; *Thomsen v. Western Elec. Co.*, 512 F. Supp. 128, 131 (N.D. Cal. 1981), *aff'd*, 680 F.2d 1263 (9th Cir.), *cert. denied*, 103 S. Ct. 348 (1982); *Murphy Tugboat Co. v. Shipowners & Merchants Towboat Co.*, 467 F. Supp. 841, 860 (N.D. Cal. 1979), *aff'd on other grounds sub nom. Murphy Tugboat Co. v. Crowley*, 658 F.2d 1256 (9th Cir. 1981), *cert. denied*, 455 U.S. 1018 (1982); *du Pont Glore Forgan, Inc. v. American Tel. & Tel. Co.*, 437 F. Supp. 1104 (S.D.N.Y. 1977), *aff'd mem.*, 578 F.2d 1367 (2d Cir.), *cert. denied*, 439 U.S. 970 (1978); *Media Networks, Inc. v. American Tel. & Tel. Co.*, 1976-1 Trade Cas. (CCH) ¶ 60,780 (D. Minn. 1976); *Chastain v. American Tel. & Tel. Co.*, 401 F. Supp. 151, 160 (D.D.C. 1975).

[35] *See* U.S. Department of Justice, Antitrust Guide for International Operations 12 (1977) (parent corporation may allocate territories or set prices for subsidiaries it controls).

[36] While we believe that any scrutiny of such conduct based on the intraenterprise doctrine is both unnecessary and counterproductive, at a minimum this Court should make clear that *per se*

The Court should make clear that corporations under common control cannot be found to have conspired among themselves in violation of the Sherman Act.

## II. MAJORITY OWNERSHIP SHOULD BE PRESUMED TO CONSTITUTE CONTROL

The fact of common control is an economic reality that should be determinative of the legal status of relationships between affiliated corporations. While control may well be conferred by a minority ownership interest,[37] we agree with the United States that it would be appropriate for the Court to adopt a conclusive presumption that sufficient control exists in any circumstances where one corporation has a majority ownership interest in another.

A rule treating majority ownership on the same basis as complete ownership would be fully consonant with decisions under the intraenterprise doctrine and with the enforcement policies of the Department of Justice. In *Sunkist Growers, Inc. v. Winkler & Smith Citrus Products Co.*, 370 U.S. 19 (1962), this Court held that affiliated legal entities (growers' associations) could not "be considered independent parties for the purposes of the conspiracy provisions of §§ 1 and 2 of the Sherman Act." *Id.* at 27. The Court reached this conclusion even though the members of two of the organizations involved (comparable to the shareholders of a corporation) were not identical. Several other courts similarly have treated majority-owned corporations on the same basis as wholly-owned subsidiaries.[38] Guidelines issued by the Depart-

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rules have no application to the relationships between affiliated companies.

[37] *See, e.g., United States v. E.I. du Pont de Nemours & Co.*, 353 U.S. 586 (1957) (23-38 percent stock ownership was found to confer "control"). *See also* Part III, *infra*.

[38] *See Thomsen v. Western Elec. Co.*, 512 F. Supp. 128 (N.D. Cal. 1981), *aff'd*, 680 F.2d 1263 (9th Cir.), *cert. denied*, 103 S. Ct. 348 (1982) (summary judgment granted to defendants over contention that parent corporation, its wholly-owned subsidiary and a company 90 percent owned by the parent had conspired in violation of

ment of Justice in 1977 likewise provide that majority ownership should be considered equivalent to total ownership for purposes of analysis under the intraenterprise doctrine.[39]

Such a rule would be particularly appropriate with regard to the relationships between affiliated Canadian and United States corporations under the auspices of FIRA. As discussed above, undertakings to make substantial equity participation in Canadian businesses available to Canadian investors frequently are necessary to obtain approval under FIRA. The existence of such Canadian minority ownership does not alter the fundamental nature of the intercorporate relationship or provide any reason for enhanced competitive concerns. The effect of applying a more stringent standard where companies are affiliated by majority, rather than complete, ownership would be to deter beneficial investments and relationships without promoting any antitrust-related goal.

## III. ANY RULE ARTICULATED BY THE COURT SHOULD TAKE INTO ACCOUNT THE SPECIAL NATURE OF THE RELATIONSHIPS BETWEEN U.S. FIRMS AND THEIR CANADIAN OR OTHER FOREIGN AFFILIATES

Even where a U.S. firm owns less than a majority interest in a Canadian affiliate, there should not necessarily be any presumption that the firms have the ca-

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the Sherman Act); *In re Penn Central Securities Litigation*, 367 F. Supp. 1158 (E.D. Pa. 1973) (summary judgment granted to defendants over contention that companies owned 99 percent, 80 percent and 51 percent by common parent had conspired in violation of the Sherman Act).

[39] U.S. Department of Justice, Antitrust Guide for International Operations 12-13 (1977). The Department has recently reaffirmed this position. *See* Memorandum of the United States in Response to the Motion of the Timken Company to Terminate the Final Judgment, at 8 (May 20, 1983), *United States v. Timken Roller Bearing Co.*, No. 24214 (N.D. Ohio).

pacity to conspire in violation of the Sherman Act. As this Court has previously held, even a relatively small ownership interest can confer certain types of control for purposes of U.S. antitrust law.[40]

Nor should the fact that a Canadian affiliate enjoys a significant measure of control over the Canadian aspects of its business—a result required by Canadian law and policy—lead necessarily to the conclusion that the firms have the requisite capacity to conspire. Rather, the lower courts should be permitted to inquire into the U.S. firm's control over those aspects of the enterprise's business distinctly affecting U.S. commerce (that is, over the U.S. aspects of the enterprise's business). Where such control is found, the firms ought not be deemed capable of conspiring under the Sherman Act.

Such an approach would generally harmonize U.S. antitrust law and Canadian law governing foreign investment so that compliance with both could be achieved and trade between the two countries thereby promoted. Failure to accommodate such a flexible approach could result in unwarranted application of U.S. antitrust law at the expense of Canadian and other foreign law aimed at establishing a measure of local control over the indigenous affairs of foreign national businesses. Such an approach would also properly recognize that Canadian companies in which U.S. firms have a not-insubstantial minority ownership have a legitimate business interest in supporting and being supported by their U.S. affiliate. Were such firms subjected to or threatened with substantial penalties for a failure affirmatively to compete, the business purpose of having minority-owned foreign affiliates[41] would become significantly diminished and

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[40] *United States v. E.I. du Pont de Nemours & Co.*, 353 U.S. 586 (1957).

[41] As indicated above, several countries, including Canada and Mexico, encourage or require minority ownership by foreign firms, including U.S. firms. *See* n.11, *supra*.

much existing trade between Canada and the United States would be threatened.

## CONCLUSION

The intraenterprise conspiracy doctrine as now formulated lacks any economic or antitrust-related foundation; it focuses on matters of form, not substance; and it inappropriately fails to take into account either the fact of common control, shared control, or other special control circumstances unique to the relationships between U.S. firms and foreign affiliates, especially where the U.S. firm's control over the foreign firm is limited in various ways by foreign law.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Brief of the Canadian Manufacturers Association and the Canadian Chamber of Commerce as Amici Curiae supporting the Petitioners has been served on all parties required to be served by first class mail, postage prepaid, addressed as follows:

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